UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

July 7, 1997

SARA CASPI, Complainant,	)	8 U.S.C. § 1324b Proceeding
	)	OCAHO Case No. 95B00159
v.	)	
TRIGILD CORPORATION Respondent.	)	

ORDER OF PARTIAL DISMISSAL

Sara (Dina) Caspi's complaint against Trigild Corporation originally alleged that Trigild Corporation discriminated against her on the basis of her citizenship status[1] and national origin, and also engaged in acts of retaliation and document abuse, all of which violated the Immigration and Nationality Act as amended, 8 U.S.C. § 1324b (1994) (INA). Trigild's answer denied the allegations and set forth as an affirmative defense that neither the underlying charge nor the complaint was timely filed.

Because substantial jurisdictional issues affecting the national origin claims still remained after two orders of inquiry made to the parties, I made a request to the Office of the Special Counsel for Immigration-Related Unfair Employment Practices (OSC) for additional information and pertinent documents obtained in the course of their investigation of the underlying charge. The specific inquiries are set forth in detail in that request and will not be repeated here. Caspi v. Trigild Corp., 6 OCAHO 907 (1997). The inquiry was occasioned because of uncertainty as to the number of respondent's employees, about which Caspi herself had made conflicting statements to OSC and EEOC, and because EEOC had assumed jurisdiction over Caspi's charges of sex discrimination and age discrimination, but Caspi's claims of national origin discrimination were not included in that charge. Questions regarding the timeliness issues were raised as well.

OSC filed responses to the request, as did both of the parties.

OSC's response

[1] By previous order (unpublished), the citizenship discrimination allegations were dismissed because Caspi is not a protected individual as defined in 8 U.S.C. § 1324b(a)(3)(B).

OSC responded to the particular questions asked, and furnished documents from the investigative file. It stated that on February 14, 1995, it received an incomplete charge postmarked February 7, 1995. In response, it requested Caspi to provide additional information and to complete a charge form. The additional information was received on April 17, 1995 and the charge was deemed complete on that day. OSC determined that the charge was untimely because the most recent date of discrimination was that of Caspi's discharge on or about May 18, 1994. Even had her charge been deemed filed on the date of her original submission, the charge would still have been untimely.

OSC determined that Trigild had 387 employees as of May 19, 1994 by counting the number of employees at all the hotels and apartment buildings managed by Trigild rather than just at the Huntington Hotel, where Caspi had worked. Documents accompanying the response indicate Trigild was hired to manage the Huntington Hotel after William J. Hoffman, president of Trigild, was appointed receiver on November 3, 1993. Trigild decided to hire the existing employees of the Huntington Hotel and all the employees were required to go through the new hire process, including the completion of new employment applications and the completion of new I-9 Forms. At that time the hotel had approximately 13 employees.

OSC stated further that it did not refer Caspi's national origin charge to EEOC because those allegations had already been brought to their attention by the California Department of Fair Employment and Housing (DFEH) filing. Caspi's formal charge was completed by DFEH on March 7, 1995, and filed with both DFEH and EEOC. For unknown reasons, only the sex and age discrimination boxes were checked on the charge form. Caspi's allegations of national origin discrimination were omitted. OSC further suggests that Caspi's OSC charge could be considered timely if it were considered "filed" as of November 9, 1994, the date of her completion of intake questionnaires she filed with the California DFEH, because this act constituted a filing with EEOC.[2]

Caspi's response

Caspi asserted she was employed at the Huntington Hotel for three years prior to the time that Trigild took over its management, and that she should therefore be relieved of having to

---

[2] OSC and EEOC have adopted a Memorandum of Understanding. 54 Fed. Reg. 32,499 (1989). By this Memorandum, each agency has appointed the other as its agent to accept charges, thereby tolling the time limits for filing national origin discrimination charges. See, e.g., Yefremov v. New York City Dep't. of Transp., 3 OCAHO 562, at 4 (1993). The effect of the Memorandum is that a filing with one agency may under appropriate circumstances be understood as a constructive simultaneous filing with the other. Curuta v. United States Water Conservation Lab, 2 OCAHO 459, at 10 (1992), aff'd, 19 F.3d 26 (9th Cir. 1994).

complete a new I-9 Form for that reason.[3] She also made numerous complaints about the final accounting for Trigild's receivership complaining of various irregularities, including problems with the payroll checks. She also said that she had not received a copy of Trigild's Motion to Dismiss.

Trigild's response

Trigild argued once again that because EEOC actually took jurisdiction over Caspi's charge and rendered a decision on the merits, her OSC charge is barred by the no overlap provision regardless of whether the charge was timely .

DISCUSSION

It is well established that an EEOC determination on the merits bars administrative law judge jurisdiction even if EEOC assumed jurisdiction erroneously. Adame v. Dunkin Donuts, 5 OCAHO 722, at 3 (1995). Here, however, unlike the facts in Adame, EEOC actually declined to assert jurisdiction over the national origin component of Caspi's charge. Because I find that the evidence demonstrates that the alleged discriminator had more than twenty employees at all times relevant to this action, the allegations of national origin discrimination must be dismissed regardless of the number of employees at the Huntington Hotel prior to the appointment of Trigild Corporation to manage it, and regardless of whether a charge was filed with EEOC. Whatever the number of employees at the Huntington Hotel prior to Trigild's taking over in November 1993, those existing employees were all required to go through the new hire process and to become Trigild's employees. Indeed it was the new hire process which ultimately gave rise to the charge underlying this action. Cases are legion stating that jurisdiction of administrative law judges over national origin discrimination claims under 8 U.S.C. § 1324b is limited to employers of four to fourteen employees. 8 U.S.C. § 1324b(a)(1)(A). See, e.g., Pioterek v. Anderson Cleaning Sys., Inc., 3 OCAHO 590, at 2 (1993). Accordingly, the national origin claim must be dismissed without regard to whether the EEOC charge was filed before or after the OSC charge, or contained the national origin claim because the number of Trigild's employees exceeds OCAHO jurisdictional limits.

The jurisdictional limitation on OCAHO's national origin jurisdiction does not, however, have any application to claims of document abuse, which are not within the coverage of Title VII or the jurisdiction of the EEOC, and are therefore not subject to the numerical limitation on the number of employees or to the no overlap provision. Document abuse is a discrete and separate claim and is not required "to be filtered through the statutory prism of a 1324b(a)(1) violation." United States v. Robison Fruit Ranch, Inc., 6 OCAHO 855, at 29 (1996). See also United States

[3] No authority is cited in support of this proposition. It may be a reference to 8 C.F.R. § 274a.2(c)(i) (1997) which provides that when an employer hires someone whom it has previously employed and for whom verification has previously taken place, the employer may rely on the prior I-9 form if it was completed within three years prior to the date of the re-hire.

v. Zabala Vineyards, 6 OCAHO 830, at 3 (1995), United States v. Guardsmark, Inc., 3 OCAHO 572, at 9 (1993). Because EEOC jurisdiction does not encompass claims of document abuse, that portion of the claim alleging document abuse is retained.

The allegations of national origin discrimination are otherwise dismissed for lack of jurisdiction.

SO ORDERED.

Dated and entered this 7th day of July, 1997.

_____

Ellen K. Thomas
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of July, 1997, I have served copies of the foregoing Order of Partial Dismissal on the following persons at the addresses indicated:

James S. Angus
Acting Special Counsel for Immigration-Related
Unfair Employment Practices
P.O. Box 27728
Washington, D.C. 20038-7728

Sara Caspi
307 E. 7th Street
Los Angeles, California 90014

Enrique L. Muñoz, Esquire
Littler, Mendelson, Fastiff,
Tichy & Mathiason
1925 Century Park East, 5th Floor
Los Angeles, California 90067-2700

Office of the Chief Administrative Hearing Officer
5107 Leesburg Pike, Suite 2519
Falls Church, Virginia 22041

_____

Cynthia A. Castañeda
Legal Technician to
Ellen K. Thomas
Administrative Law Judge
Office of the Chief Administrative
Hearing Officer
5107 Leesburg Pike, Suite 1905
Falls Church, Virginia 22041
(703) 305-1742